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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

1971 - October Term
No.

BARBIZON ELECTRIC CO., INC.,

Petitioner,

vs.

THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

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NO._____

- - - - - - - - - - - - - - - - - - - -

BARBIZON ELECTRIC CO., INC.

Petitioner

vs.

THE CITY OF NEW YORK

Respondent

- - - - - - - - - - - - - - - - - - - -

PETITION FOR A WRIT OF CERTIORARI

TO THE APPELLATE DIVISION, FIRST DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK:

BARBIZON ELECTRIC CO., INC., a New York Corporation, respectfully prays that a writ of certiorari issue to review the order of the Appellate Division, First Department of the Supreme Court of the State of New

York, entered in this action on May 11, 1971.

OPINION BELOW

No opinion was rendered by the Appellate Division in connection with the order sought to be reviewed. No opinion has been rendered in this action except on opinion by the Supreme Court, New York County, which opinion has not been reported and a memorandum decision rendered with the order modifying the judgment appealed from, which has not been reported.

JURISDICTION

The order of the Appellate Division, First Department, of the Supreme Court of the State of New York was entered on May 11th , 1971. A timely Appeal to the Court of Appeals of the State of New York was

taken and was dismissed on motion by an order dated July 7, 1971. A timely application to the said Court of Appeals for permission to appeal to that Court, was denied on October 21, 1971 and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is involved under 28 U.S.C. Sec. 1257 (3).

All constitutional questions were raised in the Court of original jurisdiction as can be seen by the opinion and judgment of that Court.

QUESTIONS PRESENTED

1. Are Section 62 of the New York City Charter and Section 505 of the New York General Municipal Law invalid and unconstitutional in violation of the Fourteenth Amendment to the United States Constitution insofar as they authorize the Board

of Estimate of the City of New York to approve Urban Renewal Plans and condemn private property.

2. The condemnation of Petitioner's property for disposition to the New York Telephone Company is not for the public purpose under which the power to condemn was delegated.

3. The condemnation of Petitioner's property was an unconstitutional taking of private property for private use without the owner's consent.

4. The Board of Estimate's restriction of the class of bidders for Petitioner's property was unconstitutional.

5. The approval of the Clinton Community Plan by the New York City Board of Estimate was invalid and unconstitutional.

STATUTORY PROVISIONS INVOLVED

New York General Municipal Law, Sections 505 and 506 are set forth at length in the appendix to the petition.

New York City Charter, Section 381 is set forth at length in the appendix to this petition.

STATEMENT OF THE CASE

Petitioner here is Barbizon Electric Co., Inc., a condemnee under the Clinton Community Development Plan. Respondent is the City of New York, condemnor.

Section 505 of the New York General Municipal Law, requires the appropriate commission, here the City Planning Commission (New York City) upon due notice and hearing, to approve plans for urban renewal.

The Clinton Community Development Plan, a plan for urban renewal, was submitted by the Housing and Development Administration of the City of New York (HDA) to the City Planning Commission on July 3, 1969. The plan provided for the condemnation of six square blocks, with certain exclusions, on the West Side of Manhattan (Page 88a). Appellant's property consisted of Lots 31, 32 and 129 on Block 1081 (Page 88a).

On August 13, 1969, the City Planning Commission held a hearing on the plan. No notice of the hearing had been given to the property owners in the project area. On August 18, 1969, the Commission issued a report approving the plan (Pages 89-94). On August 20, 1969, by an amended report the Commission modified the plan by excluding from condemnation the property owned by

Screen Gems. (Pages 95-96). This modification was made without notice or hearing.

Section 505 of the General Municipal Law further requires that the governing body, here the Board of Estimate, approve or disapprove urban renewal plans and make certain findings.

On September 18, 1969, the Board of Estimate held a hearing on the plan. The meeting was adjourned to October 23, 1969, at which time the HDA offered a new amendment (Page 52) proposing as a condition precedent to the acquisition by the City of the property owned by the New York Telephone Company on Block 1082, that petitioner's property, and others, on Block 1081 be acquired and be made available to the company by negotiated disposition. There was no notice given of this amendment and no hearing was

held with respect thereto as the hearing was closed immediately thereafter. The Board of Estimate, by resolution, adopted this amendment, Cal. No. 46-C (Pages 104-105), and approved the plan as amended (Pages 97-108). The Board failed, however, to make the required findings.

The Board of Estimate, acting governing body of the City, consists of the Mayor, the Comptroller, and the President of the Council, each of whom is entitled to cast four votes; and the President of the five boroughs, who, although they are elected from vastly disproportionate constituencies, according to the 1960 Federal census (Pages 18-19) are each entitled to cast two-votes. New York City Charter, Sections 61 and 62.

On March 23, 1970, the Deputy Mayor issued the Mayor's approval of the plan (Pages 109-116) directing the Corporation

Counsel to acquire petitioner's property. The Corporation Counsel commenced condemnation proceedings in Supreme Court, New York County.

On April 13, 1970, after having received notice of the proceeding to condemn its property, petitioner commenced the within action for a declaratory judgment, and permanent injunction; and simultaneously, by order to show cause, moved for a temporary injunction. On June 1, 1970, the condemnation order was signed, vesting title to petitioner's property in the City. Although the original plan required the condemnation of all but a half dozen properties, only one-third of the area was actually condemned, the remainder having been excluded. On June 2, 1970, petitioner's motion for a temporary injunction was denied. Petitioner served and

filed a Notice of Appeal from the order denying said motion.

On November 17, 1970, petitioner moved for summary judgment of the within action. Respondent cross-moved to dismiss the complaint. On December 3, 1970, the Supreme Court of the State of New York, County of New York, rendered its decision denying petitioner's motion and granting respondent's cross-motion, dismissing the complaint. The judgment was signed on January 4, 1971 and entered on January 21, 1971. On January 25, 1971, petitioner served and filed a Notice of Appeal from this judgment.

Petitioner moved for a stay pending appeal. On February 23, 1971 petitioner's motion was denied.

PRINCIPLES, FACTS, AND LAW INVOLVED

1. Section 62 of the New York City Charter, provides in part:

> "Voting in the board. --a. As members of the Board of estimate, the mayor, the comptroller and the president of the council shall each be entitled to cast four votes, and the president of each borough shall be entitled to cast two votes".
>
> "b. Except as otherwise provided in this charter or by law, the board shall act by resolution adopted by a majority of the whole number of votes authorized to be cast by all members of the board".

Section 505 of the General Municipal Law provides, in part:

> ". . .3 After a public hearing, held on due notice, not earlier than four weeks after the report is received or due from the (City Planning) commission, the governing body (Board of Estimate) may:
>
> "(a) if the commission shall have certified its unqualified approval, approve the plan by a majority vote. . . ."

Only the Legislature is vested with

the sovereign power of eminent domain. Kaskel v. Impellitteri, 306 N.Y. 73 (1953); Matter of the City of New York (Ely Avenue), 217 N.Y. 45, (1916). The Legislature has seen fit to delegate that power to the Board of Estimate, as governing body of the City of New York. New York City Charter, Section 381; General Municipal Law, Article 15 (Urban Renewal Law). When the Board of Estimate approves urban renewal plans and authorizes condemnation of private property in pursuance thereof, it is exercising a purely legislative power. Kaskel v. Impellitteri, supra; Matter of the City of New York (Ely Avenue), supra; Fisher v. Becker, 32 A.D. 2d 786 302 N.Y.S. 2d 470 (2nd Dept. 1969); Fix v. City of Rochester, 271 N.Y.S. 2d 87, 92 (1966).

The Board of Estimate consists of

the Mayor, the Comptroller, the President of the Council, and the Presidents of the five Boroughs, (New York City Charter, Section 6).

The Mayor, the Comptroller, and the President of the Council are of course elected on a city wide basis, however, the Borough Presidents, each of whom has an equal vote on the Board of Estimate, are elected solely from their respective Boroughs. The five boroughs comprising the City of New York were never intended to be, nor are they now, of equal or near equal population (Pages 18-19). As evidenced by the Calendars of the Board of Estimate, the Board exercises a wide variety of general governmental powers throughout the City of New York (Pages 17-18 and Exhibit C to plaintiff's affidavit in support of motion for summary judgment which by stipulation of

the parties has not been reproduced in the record on appeal.)

The foregoing must be considered in light of the "equal protection" clause of the Fourteenth Amendment to the United States Constitution and the construction thereof by the Supreme Court of the United States and by the courts of the State of New York.

The most recent in a series of United States Supreme Court decisions dealing with the applicability of the "one man, one vote" principle under the "equal protection" clause is Hadley v. Junior College District, 397 U.S. 50, 25 L.Ed. 2d 45, 90 S. Ct. 791 (1970). The Hadley case, as did those before it, involved the extent to which the Fourteenth Amendment and the "one man, one vote" principle applies in the election of local government officials.

The Court reviewed the line of cases preceding Hadley and extracted therefrom the thrust of the "one man, one vote" principle:

> "This Court has consistently held in a long series of cases, (Gesperry v. Sanders, 376 U.S. 1 (1964-congressional elections); Reynolds v. Sims, 377 U.S. 533 (1964-state legislature elections); Avery v. Midland County, 390 U.S. 474 (1968-elections of county commissioners); Gray v. Sanders, 372 U.S. 368 (1963); Burns v. Richardson, 384 U.S. 73 (1966); Swann v. Adams, 385 U.S. 440 (1967). that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's. We have applied this principle in congressional elections, state legislative elections, and local elections. The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement. While the particular offices involved in these cases have varied, in each

> case a constant factor is the decision of the government to have citizens participate individually by ballot in the selection of certain people who carry out governmental functions." (emphasis supplied)

According to the above, the test of whether an elected body must conform to the "one man, one vote" principle is whether it performs governmental functions and that under the Constitution of the United States no one man has the right to have his vote weigh greater than the vote of another in the election of government functionaries. To deprive a man of equal vote constitutes a disenfranchisement of basic constitutional rights and a denial by the State of equal protection under the laws. Thus, where the population of Brooklyn is approximately

2,600,000 and the population of Richmond is approximately 220,000 and the President of each Borough has an equal vote on the Board of Estimate, then each resident of Richmond has, in fact, greater than ten (10) times the voting power of each resident of Brooklyn. Clearly then the Board of Estimate is constituted in violation of the "one man, one vote" principle. The only question that would have remained even prior to the decision in Hadley, would be whether the Board of Estimate is in fact a body required to conform to the "one man, one vote" principle.

The test of whether an elective body had to conform to the "one man, one vote" principle was whether said body performed governmental functions. As to the question "What are general

governmental powers?", the Court in Avery v. Midland County, 390 U.S. 474, 20 L.Ed. 2d 45, 88 S. Ct. 1114 (1968), held that the following powers exercised by the county commissioners for the geographical areas from which they were elected were governmental powers:

> "...establish and maintain the County Jail, appoint numerous county officers, made contracts, build roads and bridges, administer the county welfare system, perform duties in connection with the elections, set the county tax rate, issue bonds, adopt the county budget, build and run hospitals, airports and libraries, fix school district boundaries, establish a housing authority and determine the election districts for county commissioners."

Are the functions performed and powers exercised by the Board of Estimate "important" enough and "general" enough and do they have enough of an

"impact" on the entire City of New York to justify a conclusion that the same principle as applied in Avery should be applied here? It thus becomes necessary to inquire into the nature of the functions of the Board of Estimate.

As appear on pages 17-18 of the Record of Appeal and in several of the Board of Estimate Calendars which were introduced below as Exhibit C to petitioner's affidavit in support of motion for summary judgment, but by stipulation were not reproduced in the Record on Appeal, the Board of Estimate performs, among many others too numerous to mention, the following functions: approves urban renewal plans and projects, authorizes acquisition of private property by condemnation, participates

in approval and amendment of annual capital and expense budgets for the City, approves sale, lease and disposition of real property by the City, approves publicly assisted middle income housing, authorizes sale of bonds, amends Zoning Resolution and Map of the City, appropriates salaries for Board of Higher Education personnel, approved United Nations Development District, approves subway routes and construction, approves special building permits, approves tax exemptions.

These and the many other powers of the Board of Estimate certainly are governmental in nature and have a substantial impact on all of New York City, the geographical area it governs. Compared with the powers of the governing bodies in Hadley and Avery, the

Board's powers are much broader in scope and have a far greater impact on the area, so as to justify application of the "one man, one vote" principle.

Moreover, the Lower Court in its decision denying petitioner's motion for temporary injunction (Page 30-32) stated that the determination by the Board of Estimate as to whether the taking of petitioner's property was for the benefit of the general public, is basically a legislative function. The Lower Court, in its opinion, upon which the declaratory judgment was based (Page 8-10), adopted the reasoning of the Court deciding against a temporary injunction.

Respondent has relied throughout on the New York Court of Appeals decision, Bergerman v. Lindsay, 25 N.Y. 2d 405,

306 N.Y.S. 2d 898 (1969), cert. denied 90 S. Ct. 2173 (1970), where, in a limited holding, the Court held that the Board of Estimate in its budget-making role was not subject to the requirements of the "one man, one vote" ruling.

Neither this Court, nor were the Courts of New York bound by the holding in Bergerman for two reasons. First, the instant case is readily distinguishable from Bergerman in that petitioner is challenging a legislative function of the Board of Estimate, as opposed to the non-legislative function (the budget-making power) at issue in Bergerman. The Court in Bergerman, at page 412, readily recognized the difference.

> "The present Board of Estimate in the statutory form of its budgetary powers-and those are the only ones here challenged - suggests one form of regional institution in which groups of local

> executives play some part in budget preparation which is neither legislative nor executive within classical definitions."
>
> "It would follow then, that the budget-making role of the Board of Estimate is not of such a legislative character as to prohibit the selection of executives from boroughs of unequal size, when such members could never alone control budget decisions." (emphasis supplied)

The Court also, at page 411, quoted the text from Avery:

> "'We hold today only' (P. 484, 88 S. Ct. 1114). It is this: that there must be 'no substantial variation from equal population in drawing districts for units of local governments having general governmental powers over the entire geographic area served by the body.'"

Thus, the Court, in Bergerman, recognized the rule, but found it inapplicable because only the "budget-making role" and not a legislative function of the Board of Estimate was challenged.

Finally, since Bergerman, the United States Supreme Court in Hadley, has radically revised the definition of governmental body required to be elected pursuant to the "one man, one vote" rule. The Court stated that a new rule was necessary because of the "lack of judicially manageable standards" in distinguishing between various elections. Hadley v. Junior College District, at 397 U.S. Page 55. Therefore, the Court enunciated new guidelines for distinguishing between bodies that must be elected pursuant to the "one man, one vote" principle and those that need not be.

> "We therefore hold today that as a general rule, whenever a state or a local government decides to select persons by popular election to perform governmental functions the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given

> an equal opportunity to participate in that election and when members of an elected body are chosen from separate districts each district must be established on a basis which will insure as far as is practicable that equal numbers of voters can vote for proportionately equal numbers of officials." 397 U.S. at page 56.

The Court further refused to distinguish between elections on "legislative" officials and elections of "administrative" officers because governmental activities "cannot easily be classified in the neat categories favored by civics texts." Avery v. Midland County, supra, 390 U.S. at page 482.

The Supreme Court has thereby changed the test of whether a body need be elected pursuant to the "one man, one vote" principle by eliminating all previous standards and substituting in their stead the decision by a state to

use the process of popular election and "once the class of voters is chosen and qualifications specified we see no constitutional way by which equality of voting power may be evaded." Hadley v. Junior College District, supra, 397 U.S. at page 59. Also see Gray v. Sanders, supra, 372 U.S. at page 381.

Indeed, Mr. Justice Harlan, in his dissent in Hadley, recognizes the radical departure from the previously enunciated guidelines.

> "Today the Court discards that limitation (previously enunciated in Avery v. Midland County, supra, and prior cases) stating that 'there is no discernible valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election.'" Hadley v. Junior College District, supra, 397 U.S. at page 60.

It can therefore be seen that even the opponents of the increased scope of

the "one man, one vote" principle have recognized the radical departure from previous cases made in Hadley.

It is clear enough that the Board of Estimate of the City of New York is an official body mandated to be elected by popular vote by the Legislature of the State of New York and while the Board of Estimate certainly exercises such governmental powers as would have placed it within the scope of the "one man, one vote" rule prior to the decision of the U.S. Supreme Court in Hadley, the Board is certainly a body falling within the scope of "one man, one vote" by virtue of its being elected by popular vote.

It should be noted that although petitioner does not challenge the constitutionality of the Board of Estimate

by reason of being deprived of its equal vote, petitioner does challenge the legality of an urban renewal plan and condemnation of its property by the act of such unconstitutionally elected body and thus has standing to bring this action under the "one man, one vote" principle. Norwalk Core v. Norwalk Redevelopment Agency , 395 F. 2d 920 (1968).

2. The power to condemn private property for public use in accordance with a plan for urban renewal has been delegated by the Legislature to the City of New York, acting through its governing body, the Board of Estimate. New York City Charter, Section 381; General Municipal Law, Article 15. Where, however, the condemned property is acquired for a purpose inconsistent with,

not incidental to and unnecessary for such public purpose, the taking is unauthorized, illegal and unconstitutional. New York City Housing Authority v. Muller, 270 N.Y. 333 (1936).

Whether a condemnation is for a public purpose is a judicial question. Denihan Enterprises v. O'Dwyer, 302 N.Y. 451 (1951); Pocantico Water-Works Co. v. Bird, 130 N.Y. 249 (1892); Matter of Niagra Falls & Whirlpool Ry. Co., 108 N.Y. 375 (1888); Matter of Deansville Cemetery Assn., 66 N.Y. 569 (1876).

As evidenced by Board of Estimate Resolution Cal. No. 46-C (P. 104), the single indicated purpose in acquiring appellant's property was to, by negotiated disposition, transfer it to the New York Telephone Company for private commercial use, a use not remotely

associated with the Clinton Community Development Plan (Pages 75-88a).

Section 506 of the General Municipal Law, under which the Board of Estimate purported to act in approving the Clinton Community Development Plan, provides in part:

> "1. A municipality, acting through its governing body (Board of Estimate) may acquire by...condemnation...real property or any interest...therein necessary for or incidental to a program of urban renewal..."

Only the Legislature has the power of eminent domain. Kaskel v. Impellitteri, 306 N.Y. 73 (1953); Matter of the City of New York (Ely Avenue), 217 N.Y. 45 (1916). When, by statute, the Legislature delegates that power to a municipality, the enabling law must be strictly construed, Society of New York Hospital v. Johnson, 5 N.Y. 2d 102 (1958). Since the indicated

purpose for acquiring appellant's property was unauthorized by the enabling statute, the exercise of the power of condemnation by the Board of Estimate was ultra vires, and the acquisition should be annulled.

Respondent has contended and the court below in its opinion (Pages 8-10) held:

> "The fact that the property acquired from plaintiff may be offered to the New York Telephone Company in exchange for the acquisition by the City of property presently occupied by the company does not affect the validity of the plan. (cf. Cannata v. City of New York, 11 N.Y. 2d 210)" (emphasis supplied)

The Cannata case is inapplicable here. It merely held on its own very limited facts that private property could be condemned for private commercial development where such use would

serve the public benefit. In Cannata, the condemned land was 75% vacant and underdeveloped. Such is not the case here. In fact, the project area is nearly fully occupied and commercially developed. It contains, in a six-square block area, 95 commercial businesses doing $85,000,000 of business and employing thousands of City residents. Moreover the displacement of these businesses would, contrary to the theme of public benefit, irreparably harm the economy of the city and create substantial unemployment since most of these businesses cannot relocate in the City.

The Cannata case is inapplicable here because:

> "The validity of a statute upon one set of facts is immaterial if in its application to another situation it results in invalidity."

Denihan Enterprises v. O'Dwyer, 302 N.Y. 451, 459 (1951).

The lower court apparently construed the procedure implemented by the Board of Estimate as invoking only a possibility that the petitioner's property would be exchanged for that owned by the New York Telephone Company. That construction, as evidenced by the underscored portions of lower court decision (i.e. "The fact that the property acquired from plaintiff may be offered...") is clearly in error. The Board of Estimate Resolution, Cal. No. 46-C (Pages 104-105) demonstrates beyond peradventure that such an exchange is not a mere possibility, but a directive, and that the acquisition of appellant's property is a condition precedent to the City's acquisition of the property owned by

the New York Telephone Company. Thus, the sole purpose of the acquisition of petitioner's property by condemnation was for a private purpose not in furtherance of the Clinton Community Development Plan.

The crucial point of this argument is that a taking of private property may only be justified where such property is to be devoted to public use. The court in Schneider v. District of Columbia, 117 F. Supp. 705 (1953), affirmed (Sub nom. Berman v. Parker 348 U.S. 26 (1954) set forth the ultimate test of constitutionality of condemnation under an urban renewal statute similar to Article 15 of the General Municipal Law. The language used by the court, as quoted below, in part, is enlightening:

"In the first place, a public purpose must be the reason for the seizure of private property, not merely the excuse for the seizure. There must be a necessity for the taking in order to accomplish the public purpose." (117 F. Supp. at page 721)

"The law actually requires that property be taken by eminent domain only to the extent reasonably required for the purpose for which the power is exercised." (at page 723)

"Of course the plan as pictured in the prospectus is attractive. In all probability it would enhance the beauty and the livability of the area. If undertaken by private persons the project would be most laudable. It would be difficult to think of a village, town or city in the United States which a group of artists, architects and builders could not improve vastly if they could tear down the whole community and rebuild the whole of it. But as yet the courts have not come to call such pleasant accomplishments a public purpose which validates government seizure of private property..."

> "One man's land cannot be seized by the government and sold to another man merely in order that the purchaser may build upon it a better house or a house which better meets the government's idea of what is appropriate or well-designed." (at page 724)

In this country it is a fundamental right to be free from governmental interference with the ownership and use of private property. Property rights must be zealously guarded and should be subject to trespass only upon the strongest showing of justification therefor. There is no such justification now before this Court. Rather the petitioner has been subjected to the whim and caprice of the combined acts of a public utility and a municipality. The inherent dangers of such action are frightening to behold, for if a governmental body receives judicial sanction to act solely for the

benefit of private interests and against the interests of even one citizen, it has breached the public trust so vital to its existence.

3. It is fundamental constitutional principle

> "That the property of one individual cannot, without his consent, be devoted to the private use of another, even when there is an incidental or colorable benefit to the public." New York City Housing Authority v. Muller, 270 N.Y. 333, 343, (1936); United States Constitution, Fourteenth Amendment; New York State Constitution, Article I, Sections 6 and 7.

It is likewise fundamental that

> "There is no justifiable reason why one private corporation should sustain substantial damage which would inure to the benefit of another private corporation" New York Telephone Company v. City of Binghampton, 23 A.D. 2d 453, (3rd Dept: 1965).

It is clear from the Clinton Community

Development Plan (Pages 75 to 88a) that both the 15 lots on Block 1081, of which appellant's property is a part, and the land owned but unutilized by the New York Telephone Company on Block 1082 (behind its main structure on Lot 25 thereof), were to be acquired to make room for low and middle income housing-presumably a public purpose under the Urban Renewal Law, (Article 15 of the General Municipal Law). However, on October 23, 1969, the Board of Estimate adopted the following resolution in contravention to the purpose indicated in the plan:

> "Resolved, That the City will not acquire any lot on Block 1082 unless the following conditions have been met prior to September, 1971:
>
> 1. The urban renewal plan

> shall have been amended to provide for the closing and demapping of approximately 300 linear feet of West 53rd Street beginning at the westerly line of 10th Avenue and proceeding westerly:
>
> 2. (15 lots), in Block 1081 shall have been transferred to the owner of Lot 25 in Block 1082, by negotiated disposition; and
>
> 3. The owner of Lot 25 on Block 1082 shall have been authorized to develop the land described in paragraph 2 above...to a floor ration of 10.
>
> Upon fulfillment of the conditions cited above, the City may acquire (7 lots) in Block 1082;" (Pages 104-105 of Record on Appeal).

Since the telephone company owned the seven lots on Block 1082, the City could not have acquired them under the Urban Renewal Law, because in the absence of special legislative authority, a general grant of power to condemn does

not extend to property already acquired for or devoted to a prior public use. Buffalo Sewer Authority v. Town of Cheektowaga, 20 N.Y. 2d 47 (1967); Matter of Central Hudson Gas & Elec. Corp. v. Morgenthau, 234 App. Div. 530, 259 N.Y. 569;; New York Central & H.R.R.R. Co. v. City of Buffalo, 200 N.Y. 113, (1910).

Apparently the City realized, at some point after the plan was approved by the City Planning Commission, that it could not legally acquire the telephone company's property. Thereafter, by the above Board of Estimate Resolution, the City undertook to accomplish by indirection what it could not do in a straightforward legal manner, i.e. condemn petitioner's property under the guise of urban renewal

and in the same motion exchange it for the telephone company's property by negotiated disposition. This procedure contravenes a fundamental principle of equity which the court must not sanction by exalting from over substance. Dung v. Parker, 52 N.Y. 494 (1873).

It appears well-established that the City may condemn property for a proper public purpose and under certain circumstances later abandon the plan and dispose of the acquired property to a private concern (even then the City is required to obtain the highest marketable price.) However, the initial taking must still have been justified by a showing of public benefit. In re Harlem Slum Clearance Project, 114 N.Y.S. 2d 787 (1952)

Affirmed 281 App. Div. 1024 (1st Dept.). The taking here has not been so justified. Concededly, as hereinabove stated, the plan, as originally promulgated, provided that petitioner's property, as well as that of the New York Telephone Company, was to be acquired for the noble purpose of housing. The Board of Estimate, however, by the above resolution (Which incidentially was amended and adopted without required notice or hearing as will be discussed), subverted the expressed purpose of the plan as well as the letter and spirit of the General Municipal Law. To that end, urban renewal, as the indicated public purpose, has been reduced from the reason for condemnation to the excuse for it. Schneider v. District of Columbia, 117 F. Supp. 705

(1953), affirmed (Sub Nom. Berman V. Parker, 348 U.S. 26 (1954). Thus, the reason for acquiring appellant's property was not to accomplish the authorized public purpose or urban renewal, but to placate and mollify the New York Telephone Company, without which the City could not acquire the latter's property. It is unconceivable how the acquisition of petitioner's property for disposition to the New York Telephone Company can possible be viewed as "necessary" for or incidental to a program of urban renewal, as is requiring by Section 506 (1) of the General Municipal Law, especially since said company is not a "sponsor" of the plan.

Conversely, it cannot be argued that the New York Telephone Company,

as a telegraph corporation, could have condemned petitioner's property under the statutory power delegated to it by the Legislature under Section 27 of the Transportation Corporation Law. The mere fact that the telephone company is a utility does not per se give rise to an absolute power of condemnation. It must first prove that the projected use of the property to be acquired is of primary benefit to the public and not merely a convenience to itself. Northville Dock Pipe Line Corp. v. Fanning, 21 N.Y. 2d 616 (1967); Pocantico Water-Works v. Bird, 130 N.Y. 249 (1892). There has been no showing here that petitioner's land is necessary for the operations of the telephone company or that its acquisition would benefit the public. Indeed,

such a showing could not be made because the telephone company already owns unutilized property adjacent to its main structure, which property is more than twice the size of the plot involved in the proposed exchange, of which appellant's property is a part. While the telephone company has a general power to condemn, it cannot condemn more than is reasonably necessary. Matter of City of Syracuse, 230 App. Div. 522 (4th Dept. 1930).

Clearly then, the City, acting under the guise of legislative authority, has condemned petitioner's property for private use. As early as 1852 the highest court in the State of New York denounced such practice:

> "The right of eminent domain, or inherent sovereign power, gives the Legislature the control of private property

for public uses, and only for such uses. In such cases the interest of the public is deemed paramount to that of any private individual. And yet even here, the Constitution of the United States (art. 5 of the amendments), and the Constitution of this State (art. 1 Sec. 6) (now art. 1, Sec. 7), have imposed a salutary check upon the exercise of legislative power for that purpose, by providing that private property shall not be taken for public use without just compensation."

"It follows that if the Legislature should pass an act to take private property for a purpose not of a public nature; as if it should provide through certain forms to be observed to take the property of one and give it (Or sell it, which is the same thing in principle) to another, or if it should vacate a grant of property, under the pretext of some public use, such cases would be gross abuses of the discretion of the Legislature, and fraudulent attacks on private rights, and the law would clearly be unconstitutional and void. (2 Kent's Com. 340). If the power exists

to take the property of one without his consent and transfer it to another, it may as well be exercised without making compensation as with it; for there is no provision in the Constitution that just compensation shall be made to the owner when his property shall be taken for private use. The power of making contracts for the sale and disposition of private property for individual owners has not been delegated to the Legislature, or to others through or by any agency conferred on them for such purpose, by the Legislature; and if the title of A. to property can, without his fault or consent, be transferred to B., it may as well be effected without as with a consideration. In Wilkinson v. Leland (2 Pet. 657), the late Judge Story says: The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them - a power so repugnant to the common principles of justice and civil liberty - lurked under any general grant of legislative authority, or

> ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without very strong and direct expressions of such an intention...we know of no case in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced." Powers and Wycoff v. Bergen, 6 N.Y. 358, 366-368 (1852)

If the courts of the State of New York and of this country uphold the acquisition of appellant's property for disposition to the New York Telephone Company, they might just as well burn our Declaration of Independence and Federal and State Constitutions, for one of the underlying causes of the American Revolution was to escape from

the tyrannical oppression of mother England where such practice was commonplace under the omnipotence of Parliament, Powers and Wyckoff v. Bergen, supra at page 366. Hopefully, the power of this nation lies in the people; not in the crown; and individual liberties are still paramount.

4. By its resolution, Cal No. 46-C (Page 104), the Board of Estimate required that petitioner's property be made available to the New York Telephone Company by negotiated disposition. In so doing, the Board has arbitrarily and without reasonable basis created a class of one, i.e. the New York Telephone Company, to the exclusion of all others, the appellant included. The appellant has thus been

invidiously discriminated against, a practice repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as well as to Article I, Section II of the New York State Constitution. Said the Court of Appeals in Ross v. Wilson, 308 N.Y. 605 at page 616:

> "If that can be done, it would be equally legal to permit discrimination between different organizations as purchasers on the basis of their political or religious affiliations or even their personal popularity. Such favoritism, whether well or ill founded, is not within the scope of the powers of a school district nor is it permitted by law."

The only justification for creating a class which discriminates against others is where such classification is founded upon a reasonable basis under the police power. Dauch v. City of New York, 21 N.Y. 2d 599

(1968), cert. den. 393 U.S. 834. Under the facts before this court, there can be no conceivable justification for limiting the class of bidders for petitioner's property to the New York Telephone Company. The plan for the project area intended that appellant's property be acquired and cleared for housing. Were the class of bidders limited to builders or "sponsors" the classification might be reasonable. The telephone company, however, is neither, and its projected use of the property is not by any stretch of the imagination connected with the plan, but for its own private use.

Thus, the resolution limiting the class of bidders for appellant's property must be declared invalid; so

too, the proceeding to vest title to appellant's property, which rests on said resolution, must be annulled.

5. Section 505 of the General Municipal Law sets forth the procedural requirements for promulgating and approving an urban renewal plan. Both the City Planning Commission and the Board of Estimate deviated from the mandate of this section to such an extent so as to render the approval of the plan and proceedings held subsequent thereto and in furtherance thereof invalid.

Section 505(2) provides, in part:

> "2. The urban renewal plan... shall be submitted to the (City Planning) commission which shall certify, after a public hearing held on due notice... (emphasis supplied)

The City Planning Commission failed

to give the required notice of the public hearing held with respect to the plan. This fact alone is sufficient to render the approval of the plan invalid. Blanshard v. City of New York, 262 N.Y. 5 (1933); Paliotto v. Town of Islip, 31 Misc. 2d 447 (1962).

Section 505(3) provides, in part:

> "3. After a public hearing, held on due notice...the (Board of Estimate) governing body may:
>
> (a) If the commission shall have certified its unqualified approval, approve the plan by a majority vote;" (emphasis supplied)

On October 23, 1969, the Board of Estimate held its second meeting on the Clinton Community Development Plan. The first order of business before the Board was the introduction by the HDA

of an amendment to a resolution (Page 52). The amendment added the following resolve clause:

> "Resolved, that the City will not acquire any land owned by the New York Telephone Company in Block 1082 unless the following conditions are met prior to September 1971:"
>
> "1. The City will make available to the New York Telephone Company (15 lots in Block 1081, including 3 lots owned by appellant);
>
> "2. That portion of West 53rd Street extending approximately 300 feet west of 10th Avenue shall be closed to traffic; and
>
> "3. The Telephone Company is permitted to develop the land retained on Block 1082 and the land on Block 1081 and the portion of W. 53rd Street referred to above to a Floor area Ration of 10.
>
> "Upon fulfillment of the conditions cited above the City may acquire lots 53, 14, 15, and that part of lot 7 east of an extension of the western line of lot 53 in Block 1082.

After the above amendment was offered, the hearing was closed. The resolution as amended was adopted substantially in the above form (Pages 104-105). The significance of this amendment is that it made provisions theretofore not a part of the original plan and which were not approved by the City Planning Commission. Of even greater significance is the fact that the Board gave no notice of hearing, and actually held no hearing on the amendment - an obviously clandestine attempt to put it through without opposition. Again as above, the failure to give notice and hold hearings is a fatal omission rendering the Board's approval and subsequent proceedings held thereunder invalid. Blanshard v. City of New York, supra; Paliotto v. Town of Islip, supra.

This amendment is of critical importance to petitioner's case in that it represents respondent's sole basis for the acquisition of appellant's property. Fix v. City of Rochester, 50 Misc. 2d 660 (1966) is inapplicable. In Fix, it was complained of, that there had been no notice of hearing. The court found, however; that the matter had been noticed and heard at a prior hearing. Here, the subject matter of the amendment in question had arisen for the first time on October 23, 1969. It was at that time offered without notice, and adopted without a hearing. The amendment must be stricken as having denied appellant due process.

Section 505 (4) (b) requires the Board to find by resolution that:

"The financial aid to be provided

> to the municipality is necessary to enable the project to be undertaken in accordance with the plan. (emphasis supplied)

The Board failed to make this required finding, but resolved in lieu thereof, the following:

> "5. That it is hereby found and determined that the financial aid provided and to be provided pursuant to said contract for Federal financial assistance pertaining to the project is necessary to enable the land in the project area to be redeveloped in accordance with the urban renewal plan of the project area;" (emphasis supplied)

This resolution by the Board of Estimate omits several necessary and required points which go to the heart of justifying a taking of private property. The finding required by the statute encompasses not only the redevelopment of the land, as found by the Board's resolution, but also the relocation of

displaced persons and families, the clearance of present structures, and other items "necessary to enable the project to be undertaken." The Board's resolution does not conform to what the statute requires of it. In the absence thereof, the Board has no statutory authority to act.

Section 505 (4) (c) requires the Board to find by resolution that:

> "The plan affords maximum opportunity to private enterprise, consistent with the sound needs of the municipality as a whole, for the undertaking of an urban renewal program." (emphasis supplied)

This subsection appears to be subject to either several different interpretations or to no interpretation at all, and as such should be declared unconstitutionally vague for indefiniteness. Does it mean that existing

private enterprise within the project area shall be afforded maximum opportunity? Does it mean that outside entrepreneurs shall be afforded maximum opportunity in developing the area to the exclusion of existing private enterprise? Notwithstanding the Board, in its resolution clearly failed to conform to both the letter and the spirit of the finding required by the statute. Its resolution reads as follows:

> "6. That it is hereby found and determined that the above mentioned urban renewal plan for the project area will afford maximum opportunity, consistent with the sound needs of the locality as a whole, for the rehabilitation and redevelopment of such project area by private enterprise;" (emphasis supplied)

It was never the intention of the Legislature to allow the City to condemn

private property for the benefit of a select few, "consistent with the sound needs of the locality". This subsection, as well as the rest of Section 505 (4), in the most definite terms possible, clearly indicates that the Legislature is concerned with "the municipality as a whole", not the "locality" as found by the Board of Estimate. While the plan may be "consistent with the sound needs of the locality", in that it provides for low and middle income housing in a commercially-zoned area, the Legislature never intended housing to be the sole criterion, especially where the "municipality as a whole" will suffer by it. Contrary to the finding of the Board, the utilization of the project area by private

enterprise servicing and supplying major industry on the West Side of Manhattan, and employment of thousands of principally minority group employees, is wholly more consistent with the sound needs of both the locality and the municipality as a whole.

The patent arbitrariness of the plan as promulgated is evidenced by the City's internal battle between the HDA and the City Planning Commission on one side and the Economic Development Administration on the other. The HDA is concerned only with housing. The EDA is concerned with business. The City Planning Commission is supposedly concerned with the overall long range planning of the entire City structure.

Apparently the loudest political voice has prevailed, for the houses are going up and business is going down together with the economic balance and logistics of the City. How sad it is that an entire city must suffer and individual liberties can be emasculated by the capricious whim of a few power-hungry and greedy politicians.

It is certain that if petitioner is forced out of the project area, it will go out of business. Proximately, every major television and motion picture studio and legitimate theatre in the City will be unable to obtain the emergency service petitioner provides, for the most part on an exclusive basis. The same applies to most of the other commercial enterprises in the project area. Thus,

in the absence of a finding that the plan is consistent with the sound needs of the "municipality" as a whole, rather than merely the locality, the Board had no statutory authority to act.

Section 505 (4) (d) requires the Board to find by resolution that:

> "The plan conforms to a comprehensive community plan for the development of the municipality as a whole." (emphasis supplied)

Again, the legislature has evidenced the concept of the "municipality", yet the Board of Estimate has seen fit to set its own standards and neglected to follow the statutory mandate:

> "4. That it is hereby found and determined that said urban renewal plan for the project area conforms to said general plan of the locality;" (emphasis supplied)

In the absence of a finding that the plan conforms to the general plan for the "municipality as a whole", the Board of Estimate had no statutory authority to act.

Section 505 (4) (e) requires the Board to find by resolution that:

> "There is a feasible method for the relocation of families and individuals displaced from the urban renewal area into decent, safe and sanitary dwellings, which are or will be provided in the urban renewal area or in other areas not generally less desirable in regard to public utilities and public and commercial facilities, at rents or prices within the financial means of such families or individuals, and reasonably accessible to their places of employment."

Presumably, the Legislature did not intend to provide for the relocation of commercial residents of an urban renewal area. As such, it has

invidiously discriminated against and rendered to a second class status, the individuals involved in private enterprise within the urban renewal area, and denied them the equal protection of the laws. There can be no reasonable basis under the police power for providing for the relocation of a few families while excluding a class of thousands of businessmen and employees who depend on their present locations for their livelihoods. With respect to the Clinton Development Plan, this defect is crystallized. While there are but a few hundred home dwellers in the Clinton area, which is 90 per cent commercial, there are more than 100 commercial establishments, employing more than 1,000 city residents. The vast

majority of these businesses are small. Their owners have, for the most part, devoted their entire adult lives thereto. The various City agencies charged with the responsibility of aiding in the relocation of these businesses have openly admitted that there is no suitable place for them to move. The Federal Government has ordered a moratorium on Federal funds to urban renewal projects because the City has been unable to relocate persons displaced from the project areas. Notwithstanding the facts, the Board of Estimate has arbitrarily and capriciously found by resolution that the plan for relocation was feasible and could reasonably and in timely fashion be effected.

In failing to provide for the

feasible relocation of these businesses, particularly that of the appellant, the approval of the Board of Estimate is invalid and the subsequent proceedings to vest title in the City to appellants property pursuant thereto must likewise be declared unconstitutional.

In summation, the Board of Estimate, in wholly failing to comply with the procedural requirements of Section 505 of the General Municipal Law, did not validly approve the Clinton Community Development Plan. Either said statute is unconstitutional on its face or as applied. In any event, the proceeding to vest title pursuant thereto must be annulled.

CONCLUSIONS

It is respectfully submitted that for the foregoing reasons the approval of the Clinton Community Development Plan, in general, and the condemnation of petitioner's property in particular was unconstitutional.

It is further respectfully submitted that equity and justice besides fact and law require that this petition be granted. This writ should run with respect to the five questions presented.

Respectfully submitted

BLOOM and EPSTEIN
Counsel for Petitioner
110 East 42nd Street
New York, New York 10017
Tel: (212) 687-6050

Of Counsel:
Jeremiah B. Bloom

Dated: New York, January 12, 1972

APPENDIX A

JUDGMENT APPEALED FROM

At a Special Term, Part VIII for the hearing of condemnation proceedings, of the Supreme Court of the State of New York held in and for the County of New York at the Courthouse located at 60 Centre Street, New York, New York, on the 4th day of January, 1971

P R E S E N T :

HON. SIDNEY A. FINE,
J u s t i c e

- - - - - - - - - - - - - - - - - -

BARBIZON ELECTRIC CO., INC.
Plaintiff

-against-

THE CITY OF NEW YORK
Defendant

- - - - - - - - - - - - - - - - - -

The issues in the above entitled action having been regularly brought on before this Court on November 30,

APPENDIX A

1970, and the parties having duly appeared by their respective attorneys, and the allegations and proofs of the parties having been submitted in support of their respective causes, and upon all the proceedings heretofore held, and due deliberation having been had, and upon filing the decision of the Court, dated December 3, 1970, denying the motion for a summary judgment as demanded by plaintiff, granting the cross-motion by defendant to dismiss the complaint and directing a declaratory judgment for the defendant.

NOW, on motion of J. LEE RANKIN, attorney for defendant, it is

ADJUDGED AND DECREED that plaintiff's motion for summary judgment be and the same is hereby denied

on the merits; and it is further

ADJUDGED AND DECREED that defendant's cross-motion to dismiss the complaint be and the same is hereby granted; and it is further

ADJUDGED AND DECREED that defendant herein is entitled to a declaratory judgment in this action pursuant to Section 3001 of the Civil Practice Law and Rules declaring the rights and other legal relationships of the parties hereto; and it is further

ADJUDGED AND DECREED that the provisions of Section 62 of the New York City Charter and Section 505 of the General Municipal Law, which relate to the process of condemnation authorization, are not unconstitutional on their face nor

as applied to the undisputed facts of this case; and it is further

ADJUDGED AND DECREED that the one man-one vote principle is inapplicable to the rights of the parties in this action; and it is further

ADJUDGED AND DECREED that under the undisputed facts, the acquisition of plaintiff's property by defendant is for a public purpose; and

the fact that the property acquired from plaintiff may be offered to the New York Telephone Company in exchange for the acquisition of property presently occupied by the Telephone Company does not affect the validity of the urban renewal plan.

APPENDIX A

ENTER,

/S/ S.A.F.
J.S.C.

FILED: Jan. 21, 1971
County Clerk's Office
New York

NORMAN GOODMAN
Clerk

SEAL

APPENDIX B

OPINION OF HON. SIDNEY A. FINE

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART VIII

- -

SAME TITLE

- -

SIDNEY A. FINE, J.:

Plaintiff, a domestic corporation, feeling aggrieved, sues for a declaratory judgment that section 62 of the New York City Charter and Section 505 of the General Municipal Law are unconstitutional insofar as applied to the pending condemnation proceeding covering a certain project area, or in the alternative that the City be enjoined from acquiring plaintiff's land in stage I of said project.

APPENDIX B

Following approval after public hearing by the Board of Estimate of the Clinton Urban Renewal plan on October 23, 1969 calling for the acquisition by the City of New York of specified land withint the project area, including a parcel of land owned by plaintiff, notice of the proceeding to vest title on April 15, 1970 was given to the interested parties including plaintiff. The order to condemn was actually signed by Mr. Justice Korn on June 1, 1970 without any appearance in opposition. However, pending the application to condemn, plaintiff sought a preliminary injunction in the declaratory suit by order to show cause dated April 13, 1970; to restrain the acquisition of title.

APPENDIX B

This motion was denied on June 2, 1970 by Mr. Justice Postel (N.Y. L.J., June 4, 1970, Sup. Ct., N.Y. Co.). Plaintiff now moves for summary judgment and defendant cross-moves to dismiss the complaint.

While granting or refusal of a temporary injunction does not constitute the law of the case, nevertheless the reasoning employed by Mr. Justice Postel is approved by the court and is applicable herein. Said views dispose of plaintiff's two major contentions to wit -- the violation of the one-man-one vote principle and whether under the circumstances of this acquisition, the taking may be considered to be

APPENDIX B

for a public use. The fact that the property acquired from plaintiff may be offered to the New York Telephone Company in exchange for the acquisition by the City of property presently occupied by the company does not affect the validity of the plan (cf. Cannata v. City of New York, 11 N Y 2d 210).

The city's contention that the condemnation order of June 1, 1970 is an intermediate order and may not be collaterally attached is without merit. Plaintiff utilized the correct remedy in bringing a suit for declaratory judgment (Cannata v. City of New York, supra).

The court find nothing unconstitutional on the face of the

APPENDIX B

statute or in it proposed application to the undisputed facts. The motion for summary judgment is denied and the cross motion to dismiss the complaint if granted. This disposition is a declaration on the merits in favor of the defendant directing a declaratory judgment for the City. Settle judgment in declaratory judgment form.

/S/ S.A.F.
J.S.C.

Dated: December 3, 1970

APPENDIX C

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 11, 1971

Present-Hon. Harold A. Stevens,
Presiding Justice,

Louis J. Capozzoli,
Arthur Markewich,
Emilio Nunez,
Samuel W. Eager,
Justices.

- - - - - - - - - - - - - - - - - - -

BARBIZON ELECTRIC CO., INC.

Plaintiff-Appellant

-against-

'3640

THE CITY OF NEW YORK

Defendant-Respondent

- - - - - - - - - - - - - - - - - - -

An appeal having been taken to this Court by the plaintiff-appellant

APPENDIX C

from the judgment of the Supreme Court, New York County (Fine, J.), entered on January 21, 1971, denying plaintiff's motion for summary judgment and granting defendant's cross-motion to dismiss the complaint, and said appeal having been argued by Mr. Jeremiah B. Bloom of counsel for the appellant, and by Mr. Milton H. Harris of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the judgment so appealed from be and the same is hereby modified, on the law, to the extent of striking therefrom the decretal paragraph

APPENDIX C

which grants defendant's cross-motion to dismiss the complaint, and, as so modified, affirmed, without costs and without disbursements.

ENTER

HYMAN W. GAMSO
Clerk

APPENDIX D

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh day of July A.D. 1971

PRESENT, HON. STANLEY H. FULD, Chief Judge, presiding.

- - - - - - - - - - - - - - - - - - -X

1. Mo. No. 581
BARBIZON ELECTRIC CO., INC.
Appellant

vs.

THE CITY OF NEW YORK
Respondent

- - - - - - - - - - - - - - - - - - -X

A cross-motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been there-

APPENDIX D

upon had, it is

ORDERED, that the said cross-motion be and the same hereby is granted and the appeal dismissed, with costs and ten dollars costs of motion, upon the ground that no substantial constitutional question is presented.

/S/ GARON KIMBALL
Deputy Clerk

Seal

APPENDIX E

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 16th day of September, 1971

Present-Hon. Harold A. Stevens,
Presiding Justice,

Louis J. Capozzoli,
Arthur Markewich,
Emilio Nunez,
Samuel W. Eager,
Justices.

- - - - - - - - - - - - - - - - - - -

BARBIZON ELECTRIC CO., INC.,

Plaintiff-Appellant

-against-

M-7170

THE CITY OF NEW YORK

Defendant-Respondent

- - - - - - - - - - - - - - - - - - -

The above named plaintiff-appellant having moved for leave to

APPENDIX E

appeal to the Court of Appeals from the order of this Court entered on May 11, 1971,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Barton W. Bloom in support of said motion, and the affidavit of Milton H. Harris in opposition thereto, and after hearing Mr. Barton W. Bloom for the motion, and Mr. Milton H. Harris opposed,

It is hereby unanimously ordered that the said motion be and the same is hereby denied with $10 costs.

ENTER

HYMAN W. GAMSO
Clerk

APPENDIX F

STATE OF NEW YORK,

in Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-first day of October A.D. 1971.

PRESENT,

HON. STANLEY H. FULD

Chief Judge, presiding

- - - - - - - - - - - - - - - - - -

Mo. No. 856

BARBIZON ELECTRIC CO., INC.,

Appellant

vs.

THE CITY OF NEW YORK

Respondent

- - - - - - - - - - - - - - - - - -

A motion for leave to appeal to

APPENDIX F

the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had;

ORDERED, that the said motion be and the same hereby is denied.

A copy

/S/ GARON KIMBALL
Deputy Clerk

Seal

APPENDIX G

Sections 505 and 506 of New York General Municipal Law

Section 505. Urban renewal plan and approval thereof

1. Following the designation of an area pursuant to section five hundred four of this article, the agency shall prepare or cause to be prepared an urban renewal plan for such area in its entirety or, where the designated area is of such scope that the agency deems it necessary or advisable to have the urban renewal activities to be undertaken therein carried out in stages, an urban renewal plan for a part or portion of such designated area.

2. The urban renewal plan for the designated area, or for a part or portion of such area, shall be submitted

to the commission which shall certify, after a public hearing held on due notice, whether such plan complies with the provisions of subdivision seven of section five hundred two of this article and conforms to the finding made pursuant to section five hundred four of this article. The commission shall submit its report to the governing body, not later than ten weeks from the date of referral of the plan to it, certifying its unqualified approval, its disapproval, or its qualified approval with recommendations for modifications therein.

3. After a public hearing, held on due notice, not earlier than four weeks after the report is received or due from the commission, the governing body may:

APPENDIX G

(a) if the commission shall have certified its unqualified approval, approve the plan by a majority vote;

(b) if the commission shall have certified its disapproval or shall have failed to make its report within ten weeks from the date such plan was submitted to it by the agency, nevertheless approve the plan, but only by a three-fourths vote;

(c) if the commission shall have certified its qualified approval together with recommendations for modifications, approve the plan together with the modifications recommended by the commission by a majority vote, or approve the plan without such modifications but only by a three-fourths vote.

APPENDIX G

4. Upon approving the urban renewal plan for the designated area, or for a part or portion of such area with or without modifications recommended by the commission, the governing body shall by resolution find that:

(a) The area is a substandard or insanitary area, or is in danger of becoming a substandard or insanitary area and tends to impair or arrest the sound growth and development of the municipality.

(b) The financial aid to be provided to the municipality is necessary to enable the project to be undertaken in accordance with the plan.

(c) The plan affords maximum opportunity to private enterprise, consistent with the sound needs of the

municipality as a whole, for the undertaking of an urban renewal program.

(d) The plan conforms to a comprehensive community plan for the development of the municipality as a whole.

(e) There is a feasible method for the relocation of families and individuals displaced from the urban renewal area into decent, safe and sanitary dwellings, which are or will be provided in the urban renewal area or in other areas not generally less desirable in regard to public utilities and public and commercial facilities, at rents or prices within the financial means of such families or individuals, and reasonably accessible to their places of employment.

Upon approving an urban renewal

plan for a part or portion of a designated area, the governing body shall, in addition to the foregoing, also find that the undertaking and carrying out of the urban renewal activities in stages is in the best public interest and will not cause any additional or increased hardship to the residents of such designated area.

Section 506. Acquisition of property

1. (a) A municipality, acting through its governing body, may acquire by purchase, gift, devise, lease, condemnation or otherwise, in accordance with the provisions of the appropriate general, special or local law applicable to the acquisition of real property by such municipality,

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real property or any interest therein, including but not limited to air rights; and easements or other rights of user necessary for the use and development of such air rights, to be developed as air rights sites for the elimination of the blighting influences of an area or areas consisting principally of land in streets, alleys, highways, and other public rights of way, railway or subway tracks, bridge or tunnel approaches or entrances, or other similar facilities which have a blighting influence on the surrounding area, necessary for or incidental to a program of urban renewal for residential, commercial, industrial, public, semi-public, community or other uses or combinations of such uses in

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accordance with an urban renewal plan for a designated area, or for a part or portion of such area, provided, however, that the acquisition of any air rights over railroad tracks, rights of way or facilities and easements or other rights of user necessary for the use and development of such air rights are to be subject to the provision of section fifty-one-a of the railroad law. The acquisition of real property within a designated urban renewal area shall in every case be deemed to be and constitute a continuous rather than separate takings.

(b) Property so acquired by a municipality shall be exempt from taxation until sold, leased for a term not exceeding ninety-nine years or

APPENDIX G

the lessor of (1) the sum last levied for the benefit of such taxing jurisdiction as an annual tax on such property prior to the time of its acquisition for urban renewal purposes or (2) such amount as shall be approved by the commissioner, pursuant to such rules, regulations, limitations and conditions as he may prescribe, as an eligible and proper charge against such urban renewal program. Upon the sale, lease or disposition of such property to any person, firm or corporation not entitled to an exemption from taxation or entitled to only a partial tax exemption such property shall immediately become subject to taxation in whole or in part, as the case may be, and shall be taxed

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or otherwise disposed of in accordance with the provisions of this article of this chapter; provided however, that any such municipality shall have the power and authority, with respect to such property, to pay or transfer, out of funds available to it for the effectuating of such urban renewal program, annual sums in lieu of taxes to any taxing jurisdiction providing services to the urban renewal area, or to the part or portion thereof within such taxing jurisdiction, in order that no such taxing jurisdiction shall suffer an inequitable loss of revenue by virtue of such urban renewal program; provided, further, that the amount so paid or transferred for any year with respect to any such property shall not exceed

pro rata for the unexpired portion of the taxable year.

As used in this paragraph, the term "taxing jurisdiction" means any municipal corporation or district corporation, including any school district or any special district, having the power to levy or collect taxes and benefit assessments upon real property, or in whose behalf such taxes or benefit assessments may be levied or collected.

(c) Notwithstanding any other provisions of this article, a municipality may acquire by purchase, gift, devise, lease, condemnation or otherwise, upon recommendation of the agency and in accordance with the appropriate provisions of any general, special or local law or charter

APPENDIX G

applicable to the acquisition of real property by such municipality, such real property or any interest therein, within an area designated pursuant to this article as appropriate for urban renewal, as it may deem ultimately necessary or proper to effectuate the purposes of this article although temporarily not required for such purposes, provided that the early acquisition of such property is approved as follows:

(1) In a municipality where there is a planning commission, the agency shall submit the proposal for early acquisition to the commission for its approval. Such planning commission

shall, not later than ten weeks from the date of the referral of the proposal to it, after a public hearing held on due notice, submit its report to the governing body certifying its unqualified consent, its disapproval, or its qualified consent with recommendations for modifications of the proposal.

After public hearing held on due notice after the report is received or due from the planning commission, the governing body may:

(i) if the commission shall have certified its unqualified consent, approve the proposal by a majority vote:

(ii) if the commission shall have certified its disapproval or shall have

failed to make its report within ten weeks from the date such proposal was submitted to it by the agency, nevertheless approve the proposal, but only by a three-fourths vote:

(iii) if the commission shall have certified its qualified consent together with recommendations for modifications of the proposal, approve the proposal together with the modifications recommended by the commission by a majority vote, or approve the proposal without such modifications but only by a three-fourths vote.

(2) In a municipality where there is no planning commission, the agency shall submit the proposal to the governing body which, after public hearing held on due notice, may either approve or disapprove the proposal.

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2. Notwithstanding the provisions of any general, special or local law or charter applicable to the acquisition of real property by condemnation, in any condemnation proceeding brought by a municipality to acquire property in an urban renewal area the court may in its discretion decree that title in fee simple to such property shall vest in the municipality upon the entry and filing of an order of immediate possession.

3. Prepayments. a. The governing body may authorize an appropriate officer, in all condemnation proceedings in which title and possession are or are to be vested in the municipality pursuant to subsection two of this section before the court has confirmed the amount of compensation payable for the real property condemned, to offer prepayment to the owner or owners of such property in an amount equal to seventy-five per cent of the compensation which such officer determines ought justly to be made.

b. If such offer is accepted, such officer shall enter into an agreement with such owner or owners providing

for such prepayment and shall certify to the comptroller, or in a municipality having no comptroller, the chief fiscal officer, of the municipality the amount of prepayment due and the basis upon which it was determined, and the chief legal officer of the municipality shall certify to the comptroller or chief fiscal officer, as the case may be, that the person or persons claiming such compensation are entitled to such prepayment. Payment shall be made promptly thereafter, and shall be with interest as allowed by law from the date title vests in the municipality to the date of such prepayment. The making or acceptance of such offer or of such prepayment shall be without prejudice to the right of such owner or

owners or the municipality to prosecute or defend, as the case may be, a claim for compensation. If a prepayment has been made as herein provided, the court, when confirming a determination of the amount of compensation which ought justly to be made, shall deduct therefrom the amount of such prepayment.

c. If such offer is refused or is not accepted within ninety days after such owner or owners have been notified thereof by registered mail, such offer shall be deemed withdrawn and may be revived only at the discretion of such officer. Interest on the amount of compensation so offered as prepayment shall cease to run from the date of refusal or the expiration of such ninety days,

whichever is earlier, to the date of entry of the final order in the condemnation proceeding.

d. In case the person entitled to compensation at the date of vesting of title in the municipality shall have transferred or assigned his claim, such transfer or assignment made by him or by his successor in interest or legal representative shall not become binding upon the municipality unless the instrument or instruments evidencing such transfer or assignment shall have been executed and filed in the office of the comptroller or chief fiscal officer of the municipality, prior to the making of any prepayment hereunder.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-917

BARBIZON ELECTRIC CO., INC.,

Petitioner,

against

THE CITY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-917

BARBIZON ELECTRIC CO., INC.,

Petitioner.

against

THE CITY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The memorandum decision of the New York Appellate Division rendered in connection with the order sought to be reviewed is reported in 36 AD 2d 923, 321 N.Y.S. 2d 322. The memorandum decision dismissing petitioner's subsequent appeal to the New York Court of Appeals, for lack of a substantial constitutional question, is reported in 29 NY 2d 649, 273 N.E. 2d 321. The memorandum decision denying petitioner's motion to the New York Court of Appeals for leave to appeal to that court is reported in 29 NY 2d 486, 275 N.E. 2d 339.

The unreported opinion of the New York Supreme Court (FINE, *J.*), declaring the rights of the parties and dismissing the complaint herein is set forth in Appendix G to the reasoning employed in an earlier opinion by Justice POSTEL Petition (A-6). Justice FINE's opinion, in part, adopts the on the denial of a motion for a temporary in this action. The latter opinion appears in the record at pages 30-32.

Questions Presented

1. Is the Board of Estimate's participation in the advancement of the Clinton Community urban renewal project an exercise of governmental power for the purpose of the "one-man, one-vote" rule promulgated in *Hadley* v. *Junior College District*, 397 U.S. 50 (1970)?

This issue, as posed by petitioner, is premised on a material error of fact, namely, that the Board of Estimate exercised the legislative power of eminent domain in the premises. We argue that such power, under the New York City Charter, is exercised by the Mayor, and that the Board of Estimate participated in the urban renewal project in its planning phases preliminary to condemnation.

2. Was petitioner's property taken, under the guise of a housing project, for the covert purpose of transferring it to the New York Telephone Company?

Here, again, petitioner mistakes a material fact. In the Clinton Community urban renewal project, property, including petitioner's, was condemned for the purpose of clearing an area found to be substandard and insanitary. We argue that no substantial constitutional question as to the public purpose of the taking is raised by the fact that the property may be transferred to the telephone company for redevelopment.

3. Has petitioner been deprived of equal protection of the law because the Clinton Community urban renewal plan contemplates a sale of part of the site by negotiated disposition to a redeveloper, rather than by competitive bidding?

We argue that petitioner does not have a constitutional right to compete for the purchase of public property, and that the issue is premature and newly raised.

Statutory Provisions Involved

New York General Municipal Law, §505 (McKinney's Consol. Laws of New York, Book 23, pp. 237-239) and §506 (*op. cit.*, 1971-1972 Cum. Ann. Pocket Part, pp. 89-91) are set forth in Appendix G to the petition (A-20).

The following statutes are set forth in the appendix to this brief in opposition:

New York General Municipal Law, §502, subd. 1; §507, subd. 2(d) (McKinney's Consol. Laws of New York, Book 23, pp. 230, 245),

New York City Charter, §8; §199, subds. a, b; §381 (1 Williams Press 1963 Ed., pp. 7, 91-82, 129),

New York City Administrative Code, §B15-8.0 (2 Williams Press 1971 Ed., pp. 530-531).

Statement of the Case

Petitioner is the former owner of a parcel of real estate on the west side of Tenth Avenue, between West 52nd and 53rd Streets, in the Clinton section of Manhattan. The parcel (Block 1081, Lots 29, 31, 32) is within a six-block section proposed as an urban renewal site by the Clinton Planning Council and the Clinton Housing Association (Map [R. 50], 76). The substandard character of the area is not contested.

On August 18, 1969, the City Planning Commission approved the Clinton Community Development Plan for an urban renewal project at the site pursuant to N. Y. General Municipal Law, §505 (R. 89-94). In compliance with the statute, the plan was submitted to the City's Board of Estimate. On September 18, 1969, the Board held a hearing on the matter and laid it over to October 23, 1969.

On the adjourned date the Housing and Development Administration, the city agency in charge of urban renewal, submitted an amendment to one of the proposed resolutions before the Board. It provided that none of the telephone company's lots in Block 1082 would be acquired unless and until certain other lots in the site, specifically in the adjacent Block 1081, among them the formerly owned parcel of the petitioner, were transferred to the telephone company (R. 52). The hearing was then closed, and the Board of Estimate unanimously adopted four resolutions, Cal. Nos. 46-A, 46-B, 46-C, and 46-D (R. 52, 97-108); Calendar No. 46-C, in part, adopted the amendment proposed by the Housing and Development Administration (R. 104-105).

On March 16, 1970, the Mayor, the condemning authority of the City of New York, issued his certificate approving the acquisition of the urban renewal site and directing the Corporation Counsel to initiate the condemnation proceeding (R. 69, 109). The Corporation Counsel commenced the proceeding by the publication and mailing of notice that he would apply on April 15, 1970, to the Supreme Court, New York County, for an order of condemnation (R. 43-44). On April 13th, two days before the return day of the application, petitioner commenced this action for a declaratory judgment and permanent injunctive relief against condemnation

of its property, and it simultaneously moved by order to show cause, returnable April 14, 1970, for a temporary injunction to bar the City from acquiring title (R. 49, 59).

Petitioner, as condemnee, submitted no papers in opposition to the City's application for condemnation. It challenged the prospective taking only by way of the motion for the temporary injunction (R. 61). The order of condemnation was granted without opposition on June 1, 1970 (R. 9). The motion for the temporary injunction was denied the next day (R. 30; Pet. 9).

On December 3, 1970, the New York Supreme Court granted a judgment declaring the rights of the parties and dismissing the complaint in this action. The New York Appellate Division modified with relation to a technicality. It pointed out that the judgment of dismissal of the complaint was improper because the rights of the parties had also been declared. Aside from striking the paragraph dismissing the complaint, it affirmed the judgment. 36 AD 2d 923, 321 N.Y.S. 2d 322.

ARGUMENT

The "one-man, one-vote" issue and the "public purpose" issue urged by petitioner are based on erroneous factual premises and do not present substantial constitutional questions. Nor does the proposed transfer of part of the urban renewal site by negotiated disposition, rather than by competitive bidding at public sale, raise a substantial question under the equal protection clause. Petitioner's challenge to regularity of procedure under the New York urban renewal statute does not involve a constitutional question.

A. "One-Man, One-Vote" Issue

Petitioner argues that the City of New York exercises the delegated power of condemnation through its Board of Estimate (Pet. 12, 28). The Board's exercise of such power, petitioner contends, is invalid because the election of its members violates the "one-man, one-vote" rule (*id.* 17).

The premise of that argument is utterly incorrect. With the adoption of the 1963 New York City Charter, the residual powers of the City, including the power to authorize condemnation, were transferred from the Board of Estimate to the Mayor. New York City Charter, §8; New York City Administrative Code, §B15-8.0, subd. 1. Accordingly, the proceeding for the acquisition of the Clinton Community urban renewal site was instituted by direction of the Mayor, issued on March 16, 1970 under authority of Sections 8 and 381 of the charter (R. 69, 109). The Board of Estimate participated in the urban renewal project prior to the Mayor's authorization, when on October 23, 1969 it approved the urban renewal plan pursuant to the New York State

urban renewal statute (Gen. Mun. Law, Art. 15, §505). General Municipal Law, §505, does not concern condemnation. That is dealt with in Section 506.

So far as material, General Municipal Law, §505, provides (Pet. App. G [A-21]):

> "§505. Urban renewal plan and approval thereof
>
> * * *
>
> 3. After a public hearing held on due notice, not earlier than four weeks after the report is received or due from the [city planning] commission, *the governing body* may:
>
> (a) if the commission shall have certified its unqualified approval, approve the plan by a majority vote;" (Emphasis supplied).

So far as material, General Municipal Law, §506, provides (Pet. App. G [A-25]):

> "§506. Acquisition of property
>
> 1. (a) A municipality, acting through *its governing body*, may acquire by purchase, gift, devise, lease, condemnation or otherwise, in accordance with the provisions of the appropriate general, special or local law applicable to the acquisition of real property by such municipality, real property or any interest therein, * * *." (Emphasis supplied).

Petitioner has rendered both of these provisions to equate the term "governing body" with the Board of Estimate (Pet. 11, 30). Petitioner's interpolation is erroneous as to the acquisition provision.

The term "governing body" of a city is defined alternatively by the urban renewal statute (Gen. Mun. Law, §502, subd. 1 [a] [Append., *post*, p. A1]). In cities with a population of less than one million, the "governing body" is the local legislature. In the City of New York, the statute defines the term as "the officer or agency vested with power under the charter of such city, or by other law, to act pursuant to this article." Since more than one officer or agency of the City exercises charter-derived power in connection with urban renewal, each of them comes within the term "governing body" as defined in the statute.

As will be demonstrated, in respect of the approval of an urban renewal plan, the term refers to the Board of Estimate. In respect of the power to authorize the commencement of a condemnation proceeding, however, the "governing body" is the Mayor. Obviously, the Mayor's action in directing the commencement of a condemnation proceeding does not raise a question of whether his election to office complied with the "one-man, one-vote" rule.

As noted, the Board of Estimate participates in the urban renewal process by approving an urban renewal plan pursuant to General Municipal Law, §505, subd. 3. Petitioner argues, also, that such action is invalid for purposes of the "one-man, one-vote" rule because plan approval is "a purely legislative power" (Pet. 12). Aside from the fact, as we shall show later, that the Board of Estimate does not come within that rule, the argument is faulty. The Board of Estimate is the "governing body" for the purpose of General Municipal Law, §505, subd. 3, because it has power of approval over all projects affecting the City's Master Plan. (R. 98; New York City Charter, §199). An urban renewal project is in that category (R. 90). The Board's

approval of the urban renewal plan is an exercise of a function of city planning. The urban renewal project does not reach the stage of legislative action until the Mayor authorizes condemnation of the site.

In any event, for the purposes of the "one-man, one-vote" rule, the Board of Estimate is not a legislative body, nor does it exercise general governmental power. *Bergerman* v. *Lindsay*, 25 NY 2d 405, 410, 255 N.E. 2d 142, 145 (1969), apl. dism. and cert. den., 398 U.S. 955 (1970). *Hadley* v. *Junior College District*, 397 U.S. 50 (1970), relied on by petitioner, does not aid its argument. The facts of the case, involving the election of trustees of a college district, are remote from the situation at bar. *Bergerman*, on the other hand, concerns the Board of Estimate, the very agency whose action is challenged here.

Petitioner's attempt to distinguish *Bergerman* assumes, in great part, that the Board of Estimate exercises the power of eminent domain on behalf of the City, which petitioner suggests is far more important to the electorate than the non-legislative budgetary power challenged in that case (Pet. 12, 22). As demonstrated, that assumption is mistaken. The function that the Board does perform in urban renewal, an exercise of shared power in the planning process, is reasonably similar in nature and degree, to its participation in the adoption of the budget, which was sustained in *Bergerman*.

Lastly, in connection with this issue, we note that petitioner, a corporation, concedes that it has not been deprived of an equal vote (Pet. 27-28). In the circumstances, it has no standing to raise the issue of "one-man, one-vote". *Norwalk Core* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920, 926-927 (2d Cir., 1968).

B. Public Purpose of the Taking

It is well settled that clearance of a substandard area is a public purpose, separate and distinct from the plans for its rehabilitation, which by itself will sustain an application for condemnation. Acquisition for clearance and resale to private redevelopers does not violate the principle that property may not be acquired by eminent domain for private use. *Berman* v. *Parker*, 348 U.S. 26, 34 (1954); *Kaskel* v. *Impellitteri*, 306 N.Y. 73, 78, 93, 115 N.E. 2d 659, 661, 669 (1953), cert. den. 347 U.S. 934 (1954); 2A Nichols *on Eminent Domain (Third Ed.)*, §7.51561, p. 7-188.

Petitioner, failing to understand the nature of an urban renewal proceeding, assumes that the underlying purpose of the acquisition of its property was to acquire a site for low and middle-income housing (Pet. 38, 42). That purpose, it argues, has been "subverted" by the proposed disposition of its former property to the telephone company (*id.*, 42). Such disposition, its says, is the "single indicated purpose" of the acquisition (*id.*, 29, 34, 43).

This argument rests on shaky ground. Petitioner concedes that its property was slated for acquisition under the original proposal for the Clinton project (*id.*, 37-38, 42). It remained so. The modification worked by the proposed transfer to the telephone company was, not the *inclusion* of petitoner's land in the urban renewal site, but the conditional *exclusion* of the land owned by the telephone company in the next block. Petitioner has no standing to complain of the exclusion. Without the modification, its former property would continue to be part of the urban renewal site.

Petitioner surmises that the exclusion of properties was initiated by the City because the "prior public use" rule would have barred the acquisition of the telephone com-

pany's land because the City has only a delegated and general power of eminent domain. The City, petitioner continues, is attempting to acquire the land by indirection (Pet. 39-40).

The purpose of the "prior public use" rule is to protect the public served by an actual use, not the owner of land who reserves it for future public use. Thus, the rule bars condemnation, under a general grant of authority, of property actually devoted to public use. *Buffalo Sewer Authority* v. *Town of Checktowaga*, 20 NY 2d 47, 53, 228 N.E. 2d 386, 390 (1967); 1 NICHOLS *on Eminent Domain (Third Ed.)*, §2.2, pp. 205, 211; 12 A. L. R. 1502, 1503. Even if the telephone company had objected to the condemnation of its lots and rejected any proposal for negotiated disposition and even if it had been successful in barring the taking of its property under the "prior public use" rule, petitioner's argument would not be strengthened. It still would have been proper for the City to condemn petitioner's property in the substandard area.

C. Equal Protection Issue

The amended urban renewal plan approved by the Board of Estimate excludes property of the New York Telephone Company (Block 1082, Lot 25) from the urban renewal site until and unless (a) certain lots within the site, including petitioner's former property, shall have been transferred to the telephone company by negotiated disposition and (b) the telephone company shall have been authorized to develop the said lots and adjacent land to a floor area ratio of 10 (R. 104-105). Such disposition, without competitive bidding, is authorized by General Municipal Law, §507, subd. 2 (d) [Append., *post*, pp. A1-A2].

Petitioner argues that a non-competitive disposition deprives it of equal protection of the law (Pet. 49-52). Petitioner's property was taken by due process of law in a condemnation proceeding, the regularity of which it does not challenge. It does not have a constitutional right to reacquire the property, as an urban renewal redeveloper, through the device of competitive bidding. The primary purpose of competitive bidding in the sale of publicly-owned property is to protect the public, not the bidders. A municipality's purpose in an urban renewal project may be served best by a non-competitive sale.

Petitioner argues that the telephone company is not a sponsor of the urban renewal project and will not use the part of the site concerned for a purpose consistent with the urban renewal plan (Pet. 51). This is a premature objection since the transfer to the telephone company has not been made and may not be made. If the transfer is made, it may be presumed that the City will require that the telephone company's improvement be compatible with urban renewal objectives. In any event, petitioner has no standing to challenge the redevelopment of its former property. Any impropriety in that respect could be redressed by contesting the improvement, not the prior condemnation for the purpose of clearing a substandard area. *Vanneck Realty Corp. v. City of New York*, 284 N.Y. 403, 407-408, 31 N.E. 2d 505, 506 (1940).

Lastly, we note that this issue of equal protection is newly raised. The petitioner's statement of the case does not specify how the issue was raised and passed upon below, as required by this Court's Rule 23 (f). Instead, petitioner's jurisdictional statement declares (Pet. 3):

> "All constitutional questions were raised in the Court of original jurisdiction as can be seen by the opinion and judgment of that Court."

The opinion and judgment of the New York Supreme Court should be read in the context of the complaint. So far as transfer of property without public auction is involved, that pleading challenges only the regularity, not the constitutionality, of the proposed negotiated disposition to the telephone company (R. 48, par. 19). Ruling on this issue, the opinion below states that the arrangement with the telephone company "does not affect the validity of the [urban renewal] plan" (Pet. Append. B [A-9]). The judgment includes a decretal paragraph to the same effect (Pet. Append. A [A-4]).

Although the New York Appellate Division did not render an opinion, it is clear that the equal protection issue now raised was not tendered to that Court. Petitioner's brief there challenged the absence of competitive bidding only on the ground of irregularity, as appears from the following heading of its Point IV:

> "THE BOARD OF ESTIMATE VIOLATED SECTION 384 (b) OF THE NEW YORK CITY CHARTER AND SECTION 507 OF THE GENERAL MUNICIPAL LAW."

D. Non-Federal Question

Petitioner makes a series of objections to the approval of the urban renewal plan, which may be summarized as follows (Pet. 52-64):

1. The City Planning Commission did not give notice of a public hearing on the plan.

2. The Board of Estimate approved an amendment of the plan not previously passed on by the City Planning Commission and did not give notice of the amendment.

3. The Board of Estimate did not make findings required by statute.

We pass the question of the factual accuracy of some of these charges and petitioner's omission to demonstrate that they all were raised below. On its face, petitioner's argument does not raise specific constitutional objections to the approval of the urban renewal plan, but merely challenges the approval for irregularity of procedure under General Municipal Law, §505 (Pet. 67). Petitioner concludes its argument with a bald assertion of unconstitutionality.

The challenged procedures, which preceded the Mayor's authorization to condemn, relate to the scope and expediency of the urban renewal project. A property owner has no constitutional right with respect to such preliminary steps. They must be followed by the final act of condemnation, which the Mayor may not choose to authorize.

It is only when the Mayor directs the initiation of a judicial proceeding for the acquisition of the urban renewal site that notice is given and, then only because it is required by statute in local proceedings. Absent the statutory requirement, notice of a taking is not constitutionally necessary. *People* v. *Adirondack Railway Co.*, 160 N.Y. 225, 239, 54 N.E. 689 (1899), aff'd 176 U.S. 335 (1900); *Appleby* v. *City of Buffalo*, 221 U.S. 524, 532 (1911).

Notice of the condemnation is not in issue here. Petitioner concedes that it was given (R. 43, par. 8).

CONCLUSION

The petition for a writ of certiorari should be denied.

February 2, 1972.

Respectfully submitted,

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APPENDIX

New York General Municipal Law

§ 502. Definitions

As used in this article and article fifteen-A of this chapter, the following terms shall mean:

1. "Governing body." (a) In a city, the board of aldermen, common council, commission or other body vested by its charter or other law with jurisdiction to enact ordinances or local laws, except that in a city having a population of one million or more the term "governing body" shall, as to such city, mean the officer or agency vested with power under the charter of such city, or by other law, to act pursuant to this article; (b) in a town, the town board; (c) in a village, the board of trustees.

* * *

§ 507. Disposition of property

* * *

2. Notwithstanding anything to the contrary contained in this article and notwithstanding the provisions of any general, special or local law applicable to the sale of real property by a municipality, such real property and appurtenances thereto may be sold, leased for a term not exceeding ninety-nine years or otherwise disposed of for the effectuation of any of the purposes of the urban renewal program in accordance with the urban renewal plan:

* * *

(d) to any person, firm or corporation designated by the agency as a qualified and eligible sponsor pursuant to the provisions of clause (1) of subsection (c) of this subdivision without public auction or sealed bids, provided that (1) the price or rental to be paid by such sponsor for such property

and all other essential terms and conditions of such sale, lease or other disposition shall be included in the notice published by the agency pursuant to the said clause (1) of subsection (c) of this subdivision, (2) that such sale, lease or other disposition be approved by the governing body after a public hearing held not less than ten days after the publication of such notice, and (3) such sale, lease or other disposition shall, in the case of projects aided by a state loan, periodic subsidy or capital grant or in which application has been made for such loan, subsidy or grant, be approved by the commissioner.

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NEW YORK CITY CHARTER

§ 8. GENERAL POWERS.—a. The mayor, subject to this charter, shall exercise all the powers vested in the city, except as otherwise provided by law.

* * *

§ 199. PROJECTS AND CHANGES IN CITY MAP.—a. No improvement or project affecting the master plan or the city map and no addition to or change in the city map shall be authorized otherwise than as provided in this charter.

b. Before taking action on any proposed addition to or change in the city map not initiated by the commission, the board of estimate shall refer it to the city planning commission, which shall, after a public hearing, notice of which shall be published in the City Record for at least ten days immediately prior thereto, report thereon within ten weeks with respect to its relation to the master plan and the city map. The commission may delegate to any member or members of the commission the responsibility of conducting the hearing thereon in person and of preparing the report for action by the commission. However, if any ten persons

shall file with the commission, prior to the date of any such hearing, a written request that it be conducted by the commission, such hearing shall be so conducted. If the commission shall report that the proposed action conforms to the master plan or shall recommend the approval or modification of such action it may be taken in accordance with the recommendations of the commission by a majority vote of the board of estimate. If the commission shall report that the proposed action does not conform to the master plan and shall not recommend approval of such action or shall recommend a modification thereof not accepted by the board of estimate, or shall fail to make its report within the said period of ten weeks, the board of estimate may nevertheless take the said action, but only by a three-fourths vote.

* * *

§ 381. AUTHORITY TO ACQUIRE REAL PROPERTY.—The city may acquire title in fee to real property or any interest therein whenever required for any public or municipal use or purpose or for the promotion of public utility, comfort, health, enjoyment or adornment. Such title or interest shall be acquired according to law by purchase, condemnation or otherwise.

NEW YORK CITY ADMINISTRATIVE CODE

§ B15-8.0. APPLICATION TO CONDEMN; CONTENTS OF PETITION.

Upon the application to condemn, the corporation counsel shall present to the court a petition signed and verified by him, setting forth:

1. The order of the mayor authorizing the proceeding.

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